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No. 84-988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC),
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and WCCO RADIO, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT WCCO RADIO, INC. IN OPPOSITION

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QUESTION PRESENTED

Respondent WCCO Radio, Inc. ("WCCO") adopts the statement of the question presented for review by Respondent Federal Communications Commission ("FCC").

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OPINIONS BELOW

Respondent WCCO adopts the statement of the opinions below by Respondent FCC.

JURISDICTION

Respondent WCCO adopts the statement of jurisdiction by Respondent FCC.

STATUTES AND REGULATIONS INVOLVED

Respondent WCCO adopts the statement of statutes and regulations involved by Petitioner.

STATEMENT OF THE CASE

Respondent WCCO adopts the statement of the case by Respondent FCC.

ARGUMENT

Review of the decision of the court of appeals is unwarranted. That decision is proper and correct, and does not conflict with any decisions of any court of appeals or of this Court. The court of appeals did not depart from the accepted and usual course of judicial proceedings. The decision of the Federal Communications Commission ("Commission") affirmed by the court of appeals is supported by substantial evidence and is consistent with law and policy.

1. The court of appeals properly applied the settled doctrine that the expert conclusions of an administrative agency must be sustained if such conclusions are supported by the type of substantial evidence adduced in this case. See, *e.g., Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *WEBR, Inc. v. F.C.C.*, 420 F.2d 158, 160 (D.C. Cir. 1969); *Lorain Journal Co. v. F.C.C.*, 351 F.2d 824, 828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). The court of appeals found such evidence. Specifically, the court below found that the Commission's decision was supported by evidence that WNYC's operation entailed substantial interference to WCCO's service and that WNYC's nighttime service is not essential to serve

the needs and requirements of the public. As was said in the Commission's Brief to the Court:

> "A continuation of WNYC-AM's 1 kW SSA operation would cause nighttime interference to 7,905,300 persons in a 149,600 square mile area within WCCO's 0.5 mV/m 50% skywave contour. Under its proposal to operate from a new site at 50 kW with a directionalized antenna, WNYC would cause nighttime interference to 7,158,600 persons in a 125,800 square mile area within WCCO's 0.5mV/m 50% skywave contour. The 50 kW interference area includes portions of eight states (Michigan, New York, Pennsylvania, Ohio, West Virginia, Kentucky, Tennessee and Mississippi), a "white area" (no primary aural signal) with 51,000 persons, and a "gray area" (only one primary aural signal) of 195,100 persons. All portions of the interference area receive at least ten other secondary radio services. (Pet. App. 44-45)."[1]

The Commission also found that:

> (1) "other New York City stations provide substantial amounts of programming of the same general type if not breadth and intensiveness of WNYC's";
>
> (2) "most of WNYC's SSA programming would be equally effective if presented during daylight hours"; and
>
> (3) "WNYC-FM is available to reschedule especially important programming at night."[2]

The Commission's balancing of these factors led it ra-

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[1] *FCC Brief,* p. 4, fn. 7.

[2] *City of New York Municipal Broadcasting System (WNYC),* 91 FCC 2d 635, 648 (1982). (Pet. App. 53).

tionally to conclude that the public interest would not be served by permitting continuation of WNYC's continued interference to WCCO.

2. WNYC argues that its proposal was evaluated under an improper standard. WNYC asserts that the court of appeals erred in affirming the Commission's decision that WNYC must justify a waiver of the Commission's fundamental allocation policy in order to prevail. WNYC asserts that it should have been judged according to an amorphous "public interest" standard and that the Commission should have been required to weigh the relative gains and losses in the respective listening areas of WNYC and WCCO.

In support of its position, WNYC relies upon statements made by the Commission in *Clear Channel Broadcasting*, 31 FCC 565 (1961). However, the court of appeals correctly determined that the language relied upon by WNYC was intended as merely a procedural device to permit WNYC's then-pending application to remain on file with the Commission (Pet. App. 18). More importantly, the court of appeals stated that even if it accepted WNYC's position that its proposal was not a waiver case, the court would still affirm the decision of the Commission (Pet. App. 18-20).

3. This case has been on-going since 1954 when a WNYC nighttime application was first filed with the Commission. Two rounds of extensive evidentiary hearings have been held and the Commission had before it a record which fully encompassed all of the factual matters pertaining to the operation of both stations. There can be no doubt that WNYC has been afforded due process. Its argument that the Commission has changed the litigated issue is incorrect.

In 1961, as well as now, WNYC's proposal represented a

departure from fundamental Commission allocation policy. *Clear Channel Broadcasting,* 31 FCC 565 (1961). Accordingly, since 1961, WNYC necessarily has been aware that it would have to meet the "heavy burden" of justifying an incursion into such policy. *WAIT Radio v. F.C.C.,* 459 F.2d 1203 (D.C. Cir. 1972). The Commission did not change the rules of the game post-hoc; rather, WNYC's factual showing, and the record evidence, did not permit the Commission rationally to determine that the public interest would be served by permitting continued injurious interference to WCCO in order to allow WNYC to provide service which could easily be provided through alternative means, particularly its own FM station, WNYC-FM, a fulltime station.

4. In any event, the court of appeals held that its standard for review of the Commission actions is the same whether or not the case is characterized as a waiver case. The Court could only have overturned the Commission's decision had it been unsupported by substantial evidence. As the court of appeals stated:

> "While we believe this was, in essence, a waiver case, we do not think a contrary conclusion would affect our standard of review sufficiently to affect the outcome of the case." Pet. App. 18.

Hence, the court of appeals already has determined that even acceptance of WNYC's argument that it should not have been subjected to the burden of a "waiver" case would not have changed the result, because it is properly grounded in substantial evidence. Therefore, no further review of this case is warranted.

CONCLUSION

The record establishes that substantial evidence underscored the Commission's decision and, accordingly, the court of appeals' decision is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 5, 1985